

1
2
3
4
5
6
7
8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
10 AT TACOMA

11 GARY OSTER,

12 Plaintiff,

13 v.

14 HAROLD CLARKE, *et al*,

15 Defendants.
16
17

Case No. C07-5508RJB-KLS

ORDER GRANTING IN PART
PLAINTIFF'S MOTION FOR
EXTENSION OF TIME

18 This matter has been referred to Magistrate Judge Karen L. Strombom pursuant to 28 U.S.C. §
19 636(b)(1), Local Rules MJR 3 and 4, and Federal Rule of Civil Procedure ("Fed. R. Civ. P.") 72. The
20 case is before the Court on plaintiff's filing of a motion for extension of time for discovery and to respond
21 to defendants' motion for summary judgment. (Dkt. #47, #50). After reviewing plaintiff's motion,
22 defendants' response thereto and the balance of the record, the Court finds and orders as follows:

23 On May 27, 2008, the Court issued a pretrial scheduling order setting a deadline of October 27,
24 2008, by which to complete discovery, and a deadline of November 27, 2008, by which to file dispositive
25 motions. (Dkt. #30). Defendants timely filed their motion for summary judgment on November 26, 2008.
26 (Dkt. #47). That motion was noted for consideration on December 19, 2008.¹ (Id.). Plaintiff filed his
27

28 ¹Plaintiff asserts in his motion for extension of time that this noting date is premature, and that defendants' motion for
summary judgment instead should have been noted for consideration one week later on December 26, 2008. Plaintiff is incorrect.
Local Rule CR 7(d)(3) requires that all dispositive motions be noted for the fourth Friday after filing and service of the motion.

1 motion with the Court on December 17, 2008,² which is two days after the deadline for filing his response
2 to defendants' motion for summary judgment, and, as noted by defendants, nearly two months after the
3 discovery cut-off deadline. (Dkt. #50).

4 Defendants argue plaintiff's motion to extend the discovery cut-off deadline should be denied,
5 because he has not demonstrated his failure to move for such an extension prior to that deadline was due
6 to "excusable neglect" pursuant to Fed. R. Civ. P. 6(b). (Dkt. #55). Defendants do not object to the Court
7 granting plaintiff an extension of time in which to file a response to their summary judgment motion.
8 Fed. R. Civ. P. 6(b) reads in relevant part as follows:

9 **(b) Extending Time.**

10 **(1) *In General.*** When an act may or must be done within a specified time, the court
11 may, for good cause, extend the time:

12 **(A)** with or without motion or notice if the court acts, or if a request is made, before
the original time or its extension expires; or

13 **(B)** on motion made after the time has expired if the party failed to act because of
14 excusable neglect.

15 As pointed out by defendants, *pro se* prisoners, like other civil litigants, are required to comply with both
16 the federal civil and local court rules of civil procedure, notwithstanding the Court's obligation "to make
17 reasonable allowances for pro se litigants and to read pro se papers liberally." McCabe v. Arave, 827 F.2d
18 634, 640 n.6 (9th Cir. 1987); see also Bias v. Moynihan, 508 F.3d 1212, 1223 (9th Cir. 2007); Carter v.
19 C.I.R., 784 F.2d 1006, 1008 (9th Cir. 1986) (pro se litigant is expected to abide by rules of court in which
20 he litigates); Knight v. U.S., 845 F.Supp. 1372, 1376, n.7 (D.Ariz. 1993) ("Pro se litigants . . . are
21 required to abide by the rules of this court.").

22 _____
23 The fourth Friday after defendants' filing of their summary judgment motion, however, is December 19, 2008. Accordingly, the
date for consideration of that motion was properly noted.

24 ²While the Court received plaintiff's motion for extension of time on December 23, 2008 (Dkt. #50), the Court deems it
25 to have been filed on December 17, 2008. See (Dkt. #54, Declaration of Service By Mail, signed by plaintiff on December 17, 2008,
26 in which he declares under penalty of perjury that the motion for extension of time and related documents were mailed via United
States mail from the Stafford Creek Corrections Center ("SCCC")). This is because in the case of service by incarcerated *pro se*
27 litigants, "the moment at which" such litigants "necessarily lose control over and contact with their documents is at delivery to
prison authorities, not a deposit in the public mails." Faile v. Upjohn Co., 988 F.2d 985, 987-88 (9th Cir. 1993), disapproved of on
28 other grounds, McDowell v. Calderon, 197 F.3d 1253 (9th Cir.1999) (en banc). Service under Fed. R. Civ. P. 5(b) in this context
thus is completed "upon submission to prison authorities for forwarding to the party to be served." Id. (applying "prison mailbox
rule" originally developed in the *habeas corpus* context to other civil filings). Accordingly, plaintiff's declaration of service by
mail, which was signed on December 17, 2008, is treated as having been given to prison authorities, and therefore served on
defendants (and, for the same reasons, filed with the Court), on that date.

1 Plaintiff asserts his request for an extension of discovery should be granted by the Court because
2 of prison officials' illegal transfer if his "jailhouse lawyer" and the law library's deficiencies at the prison
3 where he is incarcerated, both of which have "impeded his ability to timely prepare this case." (Dkt. #50,
4 p. 5). He argues the existence of these circumstances demonstrate excusable neglect on his part, and thus
5 warrant an order by the Court pursuant to Fed. R. Civ. P. 56(f),³ allowing him to conduct further
6 discovery and amend his complaint to correct certain deficiencies therein noted in defendants' motion for
7 summary judgment. (Dkt. #50, pp. 5-6). Defendants argue the showing plaintiff has made here does not
8 arise to the level of excusable neglect, and thus his request should be denied. The undersigned agrees.

9 In the declaration he filed in support of his motion for extension of discovery, plaintiff states that
10 in July 2007, he approached another prisoner, Matthew Silva, who also was incarcerated at the SCCC at
11 the time, to ask him for help in prosecuting this case, as Mr. Silva was "known as a competent 'jailhouse
12 lawyer.'" (Dkt. #51, p. 1). According to plaintiff, Mr. Silva drafted the complaint and gave it to him for
13 filing. (*Id.*). Plaintiff states that after the complaint was filed, he did not know how to conduct discovery,
14 nor did he understand the "complicated legal grounds" for the claims Mr. Silva alleged in the complaint.
15 (*Id.* at p. 2). Plaintiff further states that although he did receive the Court's pretrial scheduling order, and
16 was aware of the October 2008 discovery cut-off deadline, he did not understand that he had to submit his
17 discovery requests at least 30 days prior to that deadline. (*Id.*).

18 This last statement is not well-taken. As counsel for defendants pointed out to plaintiff in a letter
19 dated October 30, 2008, the Court expressly stated in its pretrial scheduling order that:

20 All discovery shall be completed by **October 27, 2008**. Service of responses to
21 interrogatories and to requests to produce, and the taking of depositions shall be
22 completed by this date. Federal Rule of Civil Procedure ("Fed. R. Civ. P.") 33(b)(3)
23 requires answers or objections to be served within **thirty (30) days** after service of the
interrogatories. The serving party, therefore, must serve his/her interrogatories at least
thirty (30) days before the deadline in order to allow the other party time to answer.

24 ³Fed. R. Civ. P. 56(f) reads:

25 **(f) When Affidavits Are Unavailable.** If a party opposing the motion shows by affidavit that, for specified reasons, it
26 cannot present facts essential to justify its opposition, the court may:

27 (1) deny the motion;

28 (2) order a continuance to enable affidavits to be obtained, depositions to be taken, or other discovery to be undertaken;
or

(3) issue any other just order.

1 (Dkt. #30, p. 1 (emphasis both added and in original); Dkt. #51-2, Exhibit 1). Thus, irregardless of any
2 lack of knowledge plaintiff may have had in regard to conducting discovery, he clearly was made aware
3 by the plain language of the Court's pretrial scheduling order that all discovery requests had to be made
4 at least thirty days prior to the discovery cut-off deadline. Indeed, plaintiff has not alleged he did not
5 receive the Court's order or that he was unable to read the contents thereof, though he may not have
6 understood all of the legal terms contained therein. Nor does the undersigned find the language quoted
7 above to be so complex and hard to understand that a *pro se* litigant, even one not familiar with the law,
8 would be unable to comprehend it. That language, in fact, is the same language used to inform all *pro se*
9 prisoner litigants of applicable pretrial deadlines and their responsibilities with respect thereto.

10 Plaintiff further states that he submitted his discovery requests as early as he was able to – on
11 October 28, 2008, one day after the discovery cut-off deadline – and that defendants' counsel waited 30
12 days before notifying him that he considered the discovery requests late. (Dkt. #50, p. 2; Dkt. #50-1, p.
13 2). First, with respect to the latter allegation, it must be pointed out to plaintiff that defendants were
14 under no obligation to inform him of his failure to timely submit his discovery requests. In addition, the
15 evidence in the record – which, incidentally, was submitted by plaintiff himself – shows that the letter
16 addressed to plaintiff by counsel for defendants was dated October 30, 2008, merely two days after
17 plaintiff stated he submitted his discovery requests. (Dkt. #51-1, Exhibit 1). Nor is there any indication
18 in the record that the letter was not sent either that day or sometime soon thereafter.

19 Second, the record does not support plaintiff's contention that he submitted his discovery requests
20 as early as he could. Plaintiff states in his declaration that after he filed his complaint, but prior to when
21 Mr. Silva was transferred to another prison, he provided Mr. Silva with a number of documents he claims
22 are needed in order to litigate this case. (*Id.* at p. 2). Plaintiff also states Mr. Silva claims that prison staff
23 seized those documents back in 2007, and never returned them. (*Id.*). Also attached to plaintiff's motion
24 is a declaration from Mr. Silva, in which Mr. Silva states he arrived at the SCCC in July 2007, sometime
25 after which he was placed in segregation based on false charges and had all of his legal files seized,
26 which apparently included those plaintiff gave him as well. (Dkt. #52, pp. 2-3).

27 Mr. Silva goes on to state that on December 4, 2007, he was illegally transferred to another
28 prison, but prison staff refused to transfer his legal files "for many months." (*Id.* at p. 3). Even after he

1 finally got his files, Mr. Silva states he discovered prison staff had stolen numerous documents
2 therefrom, which he further states included documents plaintiff had provided him for the purposes of
3 assisting in litigating this case. (Id. at pp. 3-4). Mr. Silva states he was returned to the SCCC in October
4 2008. (Id. at p. 4). None of these statements, however, support plaintiff's claim that he was unable to
5 submit his discovery requests to defendants within the given time frame. First, even if it is true as related
6 by Mr. Silva that documents had been stolen by prison staff relating to this litigation, plaintiff has been
7 aware since at least late May 2008, of the discovery cut-off deadline.

8 Nor does plaintiff allege the missing documents prevented him from making discovery requests in
9 a timely manner. Indeed, given that Mr. Silva claims the documents at issue were taken from him back
10 in late 2007 – that is, sometime between the time Mr. Silva arrived at the SCCC in July 2007, and when
11 he was transferred on December 4, 2007 – plaintiff had a period of at least four months in which to make
12 a discovery request seeking copies of those missing documents. Even if plaintiff is claiming, though he
13 has not expressly so alleged, he was not informed of the missing documents by Mr. Silva until Mr. Silva
14 returned to the SCCC in October 2008, this does not excuse plaintiff's failure to seek discovery in a
15 timely manner in this case. This is because, regardless of whether Mr. Silva was acting as his "jailhouse
16 lawyer" here, plaintiff, as a *pro se* litigant, still bears the responsibility of prosecuting his own case,
17 which includes ensuring that those who may be acting on his behalf are doing so with due diligence.

18 Waiting nearly a year – as appears to have been the case here – before making any inquiries into
19 or finding out about what has been occurring in his lawsuit, although it certainly may constitute neglect,
20 is not "excusable" neglect. Plaintiff's motion and supporting declarations make it appear that he
21 delegated all responsibility for the prosecution of his case to Mr. Silva. But Mr. Silva is not, and cannot,
22 act as his actual legal counsel in this matter. Indeed, as a party proceeding *pro se* here, plaintiff, as
23 discussed above, is obligated to abide by the Federal Rules of Civil Procedure, which includes Fed. R.
24 Civ. P. 11, requiring him to sign each document presented to the Court certifying that:

- 25 (1) it is not being presented for any improper purpose, such as to harass, cause
26 unnecessary delay, or needlessly increase the cost of litigation;
- 27 (2) the claims, defenses, and other legal contentions are warranted by existing law or by
28 a nonfrivolous argument for extending, modifying, or reversing existing law or for
establishing new law;
- (3) the factual contentions have evidentiary support or, if specifically so identified, will
likely have evidentiary support after a reasonable opportunity for further investigation

1 or discovery; and

2 (4) the denials of factual contentions are warranted on the evidence or, if specifically so
3 identified, are reasonably based on belief or a lack of information.

4 Fed. R. Civ. P. 11(b). Plaintiff, in fact, filed several motions and other documents with the Court during
5 time Mr. Silva states he was away from the SCCC. See (Dkt. #4, 8, 31, 34, 38). At least in regard to
6 these filings, therefore, it seems plaintiff did not require the assistance of Mr. Silva, thereby indicating an
7 ability to prosecute and manage his lawsuit *pro se* even when Mr. Silva is not present to help him.

8 The Court further rejects plaintiff's assertion in his motion that his constitutional right to access
9 the courts was violated by Mr. Silva's transfer. Plaintiff relies on several federal court cases to support
10 his claim here, none of which, however, actually do so. For example, plaintiff cites Kunzelman v.
11 Thompson, 799 F.2d 1172 (7th Cir. 1986), which held that although inmates do have the "right to receive
12 assistance from other prisoners," that right "is conditioned upon a showing that the inmates in question
13 did not have adequate access to the court without the help of" another prisoner. Id. at 1179 (citing
14 Bounds v. Smith, 430 U.S. 817, 821 (1977)). That is, for this right to be present, there must be no
15 "alternative means of meaningful access to the courts," such no access to law libraries or public
16 defenders. Id. at 1178-79 (citing and quoting Johnson v. Avery, 393 U.S. 483, 490 n. 11 (1969)).

17 Other cases cited by plaintiff in his motion contain similar holdings. See, e.g., Gibbs v. Hopkins,
18 10 F.3d 373, 378 (6th Cir. 1993) ("[P]risoners are entitled to receive assistance from jailhouse lawyers
19 where no reasonable alternatives are present and to deny this assistance denies the constitutional right of
20 access to the courts."); Buise v. Hudkins, 584 F.2d 223, 228 (7th Cir. 1978) ("[T]he key inquiry is
21 whether a 'reasonably adequate opportunity' to present claimed violations of fundamental constitutional
22 rights is provided."). Thus, in Buise, the transfer of an inmate who assisted other inmates in preparing
23 their legal documents was held to violate those inmates' constitutional right of access to the courts, since
24 "it left them without an alternate means" of court access. Id. In that case, however, "no law library was
25 available" and the plaintiff was the prison's "only jailhouse lawyer." Id.

26 Plaintiff does allege the SCCC's law library contains such deficiencies that without the assistance
27 of Mr. Silva, he effectively is denied access to the courts. The undersigned disagrees. Inmates do have
28 "a constitutional right of access to the courts." Cornett v. Donovan, 51 F.3d 894, 897 (9th Cir. 1995).
That right "requires prison authorities to assist inmates in the preparation and filing of meaningful legal

1 papers” by providing them with “adequate law libraries or adequate assistance from persons trained in
2 the law.” Lewis v. Casey, 518 U.S. 343, 346 (1996) (quoting Bounds, 430 U.S. at 828). Because
3 “meaningful access to the courts is the touchstone” here, however, to prevail on an access to the courts
4 claim, plaintiff must “demonstrate that the alleged shortcomings in the library or legal assistance program
5 hindered his efforts to pursue a legal claim.” Cornett, 51 F.3d at 897 (citing Bounds, 430 U.S. at 823);
6 see also Lewis, 518 U.S. at 348 (inmate must show inadequacy of prison library or legal assistance
7 program caused actual injury or prejudice such as inability to meet filing deadline or present claim).

8 Plaintiff, for example, might show:

9 [T]hat a complaint he prepared was dismissed for failure to satisfy some technical
10 requirement which, because of deficiencies in the prison’s legal assistance facilities, he
11 could not have known. Or that he had suffered arguably actionable harm that he
wished to bring before the courts, but was so stymied by inadequacies of the law library
that he was unable even to file a complaint.

12 Lewis, 518 U.S. at 352. Such is not the case here. Plaintiff, through the statements Mr. Silva makes in
13 his declaration, claims, for example, that many of the legal resources made available to prisoners in the
14 SCCC’s law library are outdated, missing pages or are “fraudulent and inaccurate.” (Dkt. #52, p. 6). But,
15 as noted above, shortcomings in a prison law library or legal assistance program must be so deficient that
16 the inmate was unable to meet a filing deadline or present a claim. As discussed above, though, even
17 with no access to what plaintiff alleges to be relevant legal documents for nearly a year, the record
18 reveals that plaintiff was able to, and did, access this Court by submitting motions and other filings. In
19 addition, also as discussed above, nothing appears to have prevented plaintiff from attempting to obtain
20 copies of those missing documents through a timely discovery request.⁴

21 Lastly, plaintiff argues additional discovery should be allowed in this matter, because, as related
22 in Mr. Silva’s declaration, after having discussed the case with plaintiff upon his return to the SCCC,
23 there are “a number of evidentiary matters” which need “to be investigated and presented” to the Court
24 before it disposes of this case. (Dkt. #52, p. 4). Through his lack of due diligence in prosecuting this case
25 and his failure to properly oversee management of what is, after all, his own *pro se* lawsuit, however,
26 plaintiff has forfeited his right to obtain such additional discovery. As discussed above, nothing
27 prevented plaintiff from making earlier discovery requests in an effort to obtain the missing legal

28 ⁴Plaintiff also has not alleged or shown that Mr. Silva, while perhaps his preferred “jailhouse lawyer,” is the only prisoner
at the SCCC to whom he can turn for assistance with the preparation of his legal filings and the prosecution of his claims.

1 documents. Indeed, even if plaintiff was unaware they were missing until October 2008, when Mr. Silva
2 returned to the SCCC, he did nothing apparently, also as discussed above, to ensure proper progression of
3 his suit.

4 Accordingly, because plaintiff has failed to demonstrate his failure to timely submit his discovery
5 requests was due to “excusable neglect,” his request for an extension of discovery contained in his
6 motion (Dkt. #50) hereby is DENIED. While it appears plaintiff’s motion for extension of time to
7 respond to defendants’ motion for summary judgment also was untimely filed,⁵ defendants do not object
8 to the Court granting him one here. (Dkt. #55, p. 3). Accordingly, plaintiff’s motion for an extension of
9 time (Dkt. #50) hereby is GRANTED to the extent that plaintiff shall have until **no later than March 2,**
10 **2009**, in which to respond to defendants’ summary judgment motion. Defendants may file a reply thereto
11 by **no later than March 6, 2009**. The Clerk, therefore, shall re-note defendants’ motion for summary
12 judgment (Dkt. #47) for consideration on **March 6, 2009**.

13 **Plaintiff is warned, however, that no further extensions of time will be granted in which to**
14 **file a response to defendant, and that failure to timely file such a response by the above date may**
15 **be taken as an admission that defendants’ motion has merit. See Local Rule CR 7(b)(2).**

16 The Clerk is directed to send a copy of this Order to plaintiff and counsel for defendants.

17 DATED this 2nd day of February, 2009.

18
19
20 

21 Karen L. Strombom
22 United States Magistrate Judge
23
24
25
26
27

28 ⁵Pursuant to Local Rule CR 3(d), “[a]ny opposition papers shall be filed and served not later than the Monday before the
noting date,” which in regard to defendants’ motion for summary judgment was December 15, 2008. As noted above, however,
plaintiff submitted his motion for extension of time for service to prison authorities two days late on December 17, 2008.